Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of M3 USA Corporation's Petition for Expedited Declaratory Ruling	)	CG Docket No. 02-278
	)	CG Docket No. 05-338
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	

COMPREHENSIVE HEALTH CARE SYSTEMS OF THE PALM BEACHES, INC. AND DR. ROBERT W. MAUTHE, M.D., P.C.'S COMMENT ON THE PETITION OF M3 USA CORPORATION'S. PETITION FOR EXPEDITED DECLARATORY RULING

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Commenters Comprehensive Health Care Systems of the Palm Beaches, Inc. ("Comprehensive") and Dr. Robert W. Mauthe, M.D., P.C. ("Dr. Mauthe" and collectively "Plaintiffs") are the plaintiffs in a TCPA action pending against petitioner M3 USA Corporation ("M3") in the United States District Court for the District of Florida.[1] Plaintiff submits these comments on M3's petition, filed March 20, 2017, seeking a declaratory ruling "clarifying that research survey invitations do not constitute 'advertisements' under the Telephone Consumer Protection Act ('TCPA'), as modified by the Junk Fax Prevention Act ('JFPA'), 47 U.S.C. §§ 227, *et seq.,* and the Commission's implementing regulations."[2] The Consumer and Governmental Affairs Bureau (the "Bureau") sought comments on M3's Petition on April 27, 2017.[3]

As argued below, the Commission should deny the Petition in its entirety. In 2006, the Commission clarified the law on fax surveys, stating:

> [T]he Commission concludes that any surveys that serve as a pretext to an advertisement are subject to the TCPA's facsimile advertising rules. The TCPA's definition of "unsolicited advertisements" applies to any communication that advertises the commercial availability or quality or property, goods or services, even if the message purports to be conducting a survey.[4]

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[1] *See Comprehensive Health Care Systems of the Palm Beaches, Inc. and Dr. Robert W. Mauthe, M.D., P.C.*, 16-cv-80967 (S.D. Fla.) (the "TCPA action").

[2] M3 USA Corporation's Petition for Expedited Declaratory Ruling , CG Docket Nos. 02-278 and 05-338 (filed March 20, 2017) (the "Petition").

[3] Consumer & Governmental Affairs Bureau Seeks Comment on M3 USA Corp. Petition for Declaratory Ruling under the Telephone Consumer Protection Act of 1991, CG Docket Nos. 02-278, 05-338 (March 28, 2017).

[4] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; the Junk Fax Prevention Act of 2005*, 71 FR 25967-01, 25972 (May 3, 2006) (the "FCC Regulation").

The existing regulation provides clear guidance that faxes concerning surveys violate the TCPA if they are pretexts for advertisement. This guidance has served the public and the courts well, without any apparent confusion or need for clarification. In this case, the District Court permitted the lawsuit to proceed because the Court found that the Plaintiffs had alleged sufficient facts to show that M3's survey solicitation was a pretext for further advertising.

M3 has not shown any good reason why the Commission should revisit, much less overturn, the regulation it previously propounded to answer this question.

FACTUAL BACKGROUND[5]

On June 10, 2016, Comprehensive filed a Class Action Complaint in the United States District Court for the Southern District of Florida, challenging M3's practice of faxing unsolicited advertisements in violation of the TCPA.[6] On November 18, 2016, Plaintiffs filed a Second Amended Class Action Complaint adding Dr. Mauthe as a Plaintiff.[7]

As alleged in the Amended Complaint, M3 sent plaintiff Comprehensive a one-page fax on December 8, 2015.[8] The fax identified M3 Global Research.[9] At the

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[5] Plaintiffs are in the discovery process in the TCPA action. Although M3 has produced documents to Plaintiffs, it has designated its entire document production as "confidential," preventing Plaintiffs from disclosing those documents with this Comment. This Comment is therefore necessarily limited to what is alleged in the Complaint and Plaintiff's independent investigation to date.

[6] Class Action Complaint, *Comprehensive Health Care Systems of the Palm Beaches, Inc. and Dr. Robert W. Mauthe, M.D., P.C.*, 16-cv-80967 (S.D. Fla.) ECF 1 ("Complaint").

[7] Amended Class Action Complaint, *Comprehensive Health Care Systems of the Palm Beaches, Inc. and Dr. Robert W.* Mauthe*, M.D., P.C.*, 16-cv-80967 (S.D. Fla.) ECF 44 ("Amended Complaint" or "ECF 44").

[8] ECF 44, ¶ 19.

[9] ECF 44-1.

top, the fax said, "EARN COMPENSATION FOR YOUR OPINION!"[10] It stated that M3 was "currently conducting an online survey with Gastroenterologists," and invited Comprehensive to "participate."[11] It offered to pay $71 "upon completion" and assured that it would only take "25 minutes online."[12] It provided a "Survey link: http:/www.m3globalresearch.com/myinvite."[13]

M3 sent plaintiff Mauthe 12 separate, substantially similar faxes.[14] Each of the faxes offered money in exchange for participation in a survey.[15] All but three of these faxes were not addressed to Mauthe personally; rather they were addressed to "Doctor," "ALL Physical Medicine and Rehabilitation specialists," or "Physical Therapists and Occupational Therapists."[16] Each of the Mauthe faxes contained the same "Survey link: http:/www.m3globalresearch.com/myinvite."[17]

That survey link led to a registration login. The "Privacy Policy" on that site explained the survey was for "medical marketing, research, and development purposes."[18] Furthermore, M3 Global Research described itself as the "market research division and a subsidiary of M3 Inc."[19]

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[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] ECF 44-2 through 44-13.

[15] *Id.*

[16] ECF 44-2 through 44-10.

[17] ECF 44-2 through 44-13.

[18] ECF 44, ¶ 29, ECF 44-16 (emphasis added).

[19] ECF 44-17, p. 2 (emphasis added).

M3's "Terms of Use" described any use of their websites as "services."[20] In addition, registration would include consent to receive emails, including "advertisements."[21] M3 uses the "market research" data generated by surveys, such as the one they invited Plaintiffs to participate in, to market itself to "companies in the pharmaceutical industry."[22]

PROCEEDINGS IN THE DISTRICT COURT

M3 moved to dismiss the Amended Complaint, arguing that its faxes were not advertisements as a matter of law.[23] The District Court denied that motion, stating:

> Plaintiffs allege that Defendant is a Delaware corporation, of which MDLinx is a division. *Id.* ¶¶ 14–15. Defendant's clients are companies in the pharmaceutical industry looking for feedback or ideas from health professionals on how to improve the industry. *Id.* ¶ 9. As a result, Defendant sends advertisements by fax to Plaintiffs and others in which Defendant offers compensation for participation in online surveys and advertises the commercial availability of Defendant's online paid survey program, through which Defendant gathers market research and opinions from health professionals for its clients. *Id.* ¶¶ 20–24. Plaintiffs further allege that they did not invite or consent to being sent advertisements from Defendant on their fax machines. *Id.* ¶ 41. Therefore, Plaintiffs contend that Defendant violated the TCPA by sending unsolicited advertisements without prior express invitation or permission and without a clear and conspicuously displayed opt-out notice. *Id.* Count I.

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[20] ECF 44-15, p. 2.

[21] ECF 44, ¶ 30.

[22] ECF 44-17, p. 4.

[23] M3 USA Corporation's Motion to Dismiss Second Amended Class Action Complaint Pursuant to Rule 12(b)(6) for Failure to State a Claim, *Comprehensive Health Care Systems of the Palm Beaches, Inc. and Dr. Robert W. Mauthe, M.D., P.C.*, 16-cv-80967 (S.D. Fla.) ECF 46 ("Motion to Dismiss").

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In pertinent part, the Complaint alleges that through the online survey program, Defendant gathers information and opinions from health professionals, which it then shares with its clients, who are companies in the pharmaceutical industry. Compl. ¶¶ 9, 23. The faxes at issue direct a potential participant to a survey weblink, which in turn directs the potential participant to the website's "Privacy Policy," stating that Defendant may target advertising and marketing based upon information provided by a potential participant during the registration process. *Id.* ¶¶ 25–30. "For example, a user that registers with oncology as his/her specialty, or frequently uses oncology-related Services, or informs M3 that oncology is a significant component of his/her practice may be served oncology-related advertisements and invitations to participate in oncology-related sponsored programs, on both M3 and third party Services." *Id.* ¶ 30; *see also* ECF No. [44–16]. Moreover, Defendant's "Terms of Use" specify that by using the company's sites and providing "User Materials," the user grants Defendant and others the right "to use User Materials in connection with all aspects of the operation and promotions of Company." *Id.* ¶ 28; *see also* ECF No. [44–15]. In the face of these allegations, the ultimate question of whether Defendant's survey fax is merely a pretext for advertising its goods or services is a question of fact not suitable for disposition as a matter of law upon a motion to dismiss. *See Eden Day Spa, Inc. v. Loskove*, No. 14–81340–CIV, 2015 WL 1649967, at *3 (S.D. Fla. Apr. 14, 2015) (denying motion to dismiss, where fax could be construed as an advertisement as part of an overall marketing campaign); *see also Neurocare Inst. of Cent. Fla., P.A. v. Healthtap, Inc.*, 8 F. Supp. 3d 1362, 1367 (M.D. Fla. 2014) (denying motion to dismiss, where complaint alleged that a fax promotes services or opportunities available through a company's website). The cases cited by Defendant in the Motion to Dismiss do not persuade the Court otherwise with respect to Count I.[24]

[24] Order on Defendant's Motion to Dismiss and Motion to Stay, January 11, 2017, *Comprehensive Health Care Systems of the Palm Beaches, Inc. and Dr. Robert W. Mauthe, M.D., P.C.*, 16-cv-80967 (S.D. Fla.) ECF 55 ("ECF 55"), at 1-2, 5-6 (footnote omitted), published at – F. Supp. 3d –, 2017 WL 108029 at *2-*3.

M3 filed a motion for reconsideration in the District Court.[25] The District Court denied the Motion to Reconsider as well.[26] The Court explained:

> Defendant states conclusively that "Services," as defined by the Privacy Policy, ECF No. [44-16], attached the Complaint, are separate from market surveys1, and that the registration process and policies for "Services" are separate from participation in the surveys. Defendant further conclusively asserts that the Privacy Policy states that the surveys are governed by "additional terms and conditions," which Defendant argues necessarily includes the language on the face of the faxes themselves. However, Defendant's conclusive assertions are not supported by the language of the Privacy Policy, nor do they amount to anything more than denials of the allegations in the Complaint. Contrary to Defendant's argument, the Privacy Policy does not explicitly state that survey participation is separate from the general registration for "Services." In fact, the Privacy Policy states that "[b]y visiting one of the Sites, or by using the Services, you are accepting the practices described in this Privacy Policy Statement." ECF No. [44-16] at 2. Furthermore, the "additional terms and conditions" referenced in the Privacy Policy are not specified to be those stated on the face of the faxes. The Privacy Policy states only that"[i]n order to participate in any such survey, you will be required to agree to additional terms and conditions as part of the opt-in process." ECF No. [44-16] at 3. The Complaint alleges that the faxes at issue direct a potential participant to a survey weblink, which in turn contains a link directing the potential participant to the website's Privacy Policy and Terms of Use. Complaint ¶¶ 25-27. Defendant's Terms of Use specify that by using the company's sites and providing "User Materials," the user grants Defendant and others the right "to use User Materials in connection with all aspects of the operation and promotions of Company." *Id.* ¶ 28; *see also* ECF No. [44-15]. Moreover, the Complaint alleges that the

[25] M3 USA Corporation's Motion for Reconsideration pursuant to Rule 54(b), January 17, 2017, *Comprehensive Health Care Systems of the Palm Beaches, Inc. and Dr. Robert W. Mauthe, M.D., P.C.*, 16-cv-80967 (S.D. Fla.) ECF 56 ("Motion to Reconsider")

[26] Order on Motion for Reconsideration, February 2, 2017, *Comprehensive Health Care Systems of the Palm Beaches, Inc. and Dr. Robert W. Mauthe, M.D., P.C.*, 16-cv-80967 (S.D. Fla.) ECF 55 ("ECF 61").

> Privacy Policy states that Defendant may target advertising and marketing based upon information provided by a potential participant during the registration process. *Id.* ¶ 30. The fact that the faxes state that a survey participant will not be solicited and that there are no sales or endorsements associated with the surveys is not dispositive at this juncture. Taking the well-pled allegations of the Complaint as true as the Court must, and did in rendering its Order, the inconsistency between the language on the face of the faxes and the facts alleged is sufficient to state a plausible claim for relief under the TCPA. [27]

ARGUMENT

No good cause exists to grant M3's petition. The issue of liability for faxed survey solicitations was adequately addressed in 2006, when the Commission clarified that surveys may be actionable if they "serve as a pretext to an advertisement are subject to the TCPA's facsimile advertising rules."[28] M3 wrongly argues that there is now a Circuit split over whether fax "survey" solicitations are actionable. In fact, the cases cited by M3 do not involve "survey" faxes, nor are their holdings inconsistent. The District Court here correctly found a straightforward factual dispute over whether M3's "survey" faxes are pretextual, and denied a motion to dismiss to provide additional discovery on the issue. M3 has not shown any good reason why the Commission should revisit, much less overturn, the regulation it previously propounded to answer this question.

I. THERE IS NO NEED FOR DECLARATORY RELIEF.

M3 argues that declaratory relief here will "terminate a controversy or

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[27] ECF 61 at pp. 3-4.

[28] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; the Junk Fax Prevention Act of 2005*, 71 FR 25967-01, 25972 (May 3, 2006) (the "FCC Regulation").

remove uncertainty."[29] That is not so. There is no legal uncertainty on when a survey fax is actionable. The 2006 FCC Regulation resolved that. Faxes concerning surveys are actionable if they are a pretext for advertising. Consistent with the regulation, the District Court properly found that there is a factual issue as to whether M3's faxes are a pretext for registering medical providers to receive M3 marketing and sell M3 services. There is no legal uncertainty to resolve, and the District Court is in the best position to resolve the factual dispute.

II. THERE IS NO COURT "CONFUSION" ABOUT THE COMMISSION'S PRIOR PRONOUNCEMENTS ABOUT FAXED SURVEYS.

M3 contends that declaratory relief from the Commission is needed "to dispel confusion among the courts concerning circumstances under which survey faxes are pretexts for advertisements regulated under the TCPA."[30] There is in fact no such "confusion." M3 points to two Circuit Court decisions, *Sandusky Wellness Ctr., LLC v. Medco Health Solutions, Inc.*,[31] and *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharmaceuticals, Inc*.[32] However, neither of those cases even involved surveys or invitations for surveys. The fax in *Sandusky* was sent by a pharmacy benefit manager to medical providers so that the providers so that the providers can know what medications are covered by their patients' health care plans.[33] The fax in *Boehringer* was an invitation to a "dinner meeting" to discuss medical conditions for

[29] Petition at 10.

[30] Petition at 10.

[31] 788 F.3d 218 (6th Cir. 2015).

[32] 847 F.3d 92 (2nd Cir. 2017).

[33] 788 F.3d at 219.

which the company had developed pharmaceuticals.[34] Because these cases involved neither surveys nor survey invitations, it is disingenuous for M3 to contend that the cases reflect a "confusion" about how to treat survey faxes.

Nor do *Sandusky* and *Boehringer* reflect a confusion as to the definition of "advertisements" in general. *Sandusky* found that the list of pharmaceuticals at issue was not an advertisement because it was not "an indirect commercial solicitation, or pretext for a commercial solicitation."[35] *Sandusky* explicitly distinguished faxes for seminars like the one later at issue in *Boehringer:*

> To be sure, a fax need not be an explicit sale offer to be an ad. It's possible for an ad to promote a product or service that's for sale without being so overt, as in the free-seminar example, *see* 71 Fed. Reg. at 25973, or as in *Turza,* 728 F.3d at 688. The best ads sometimes do just that. But the fax itself must at least be an indirect commercial solicitation, or pretext for a commercial solicitation. If it's not, it's not an ad. And the record shows that these faxes were not. So they're not ads as a matter of law.[36]

Far from showing confusion, *Sandusky* and *Boehringer* are entirely consistent in holding that faxes for seminars may be advertisements if the seminar will provide a platform for advertising goods or services.

Ignoring that the fax in *Boehringer* was for a "free" seminar, M3 misrepresents the decisions in that case. M3 asserts that "the Second Circuit … would apparently have District Courts presume that any fax sent by a for-profit

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[34] 847 F.3d at 95.

[35] 788 F.3d at 225.

[36] *Id., citing Ira Holtzman, C.P.A. v. Turza,* 728 F.3d 682, 688 (7th Cir. 2013).

entity is a pretext for an advertisement."[37] But *Boehringer* is nowhere near that sweeping, and instead is explicitly limited to faxes advertising "free seminars" in the context of plausible surrounding allegations that the company would market products or services at the seminar.[38] M3 also misstates the concurring opinion of Judge Leval as "contending that faxes sent by for-profit entities are *per se* advertisements under the TCPA."[39] Nonsense! Judge Leval's comments were expressly limited to "faxes offering free goods or services."[40]

M3 cites four other trial court opinions where faxes were held not to be advertisements.[41] The fact that trial courts have successfully applied the Commission's pronouncements to determine that certain faxes were not advertisements does not support the view that those pronouncements need to be clarified. Nor do these decisions in favor of fax senders suggest that there is a threat of unfounded litigation.

For all these reasons, the *Sandusky* and *Boehringer* opinions do not reflect "confusion" among the Circuits, or call for clarification by the Commission.

III. M3'S CONCERN ABOUT "IN TERROREM" SETTLEMENT PRESSURE IS UNFOUNDED.

According to M3, the fax survey solicitation industry is now being terrorized by a barrage of class action TCPA litigation. That picture of an industry in terror is a phantom. In fact, M3 has not shown that fax survey companies (to the extent

[37] Petition at 13.

[38] 847 F.3d at 97.

[39] Petition at 13 n. 43.

[40] 847 F.3d at 97 (Leval, J., concurring).

[41] Petition at 13.

there are competitors to M3) are facing a barrage of TCPA litigation. M3 has not even shown that it has a competitor who operates in the same way M3 does– sending faxes to solicit registration at a social network portal. Although M3 cites numerous cases addressing (without evident difficulty) what a fax "advertisement" is, it cites no cases to show that other survey companies are being sued for sending fax advertisements in violation of the TCPA. This simply is not a widespread or common problem, and is best addressed in the judicial forum as a dispute between the parties.

As explained above, the law on fax surveys is clear and should be straightforward for M3's competitors (if there are any) to follow. The Commission has spelled out clearly enough that survey faxes are not advertisements for purposes of the TCPA unless they are a pretext for advertising. To avoid the threat of liability is therefore very easy. A survey company should not send faxes as a pretext to promote their goods and services. If M3 can show that it did not use its faxes as a pretext, it will be in the clear. Unfortunately, M3's online terms of use and privacy policy say just the opposite. M3 also could have included compliant opt out notices on its faxes, or asked permission before sending the faxes, and thereby avoided any risk of liability. Instead, M3 sent millions of faxes for an online survey process that required participants to register for additional advertisements. If M3 now faces the prospect of TCPA class litigation, that is because M3 invited that litigation through legally risky behavior.

M3 again attempts to buttress its position with cases that have nothing to do

with survey solicitations. M3 points to a substantial class action settlement in *Podiatry In Motion, Inc. v CoverMyMeds, LLC.* [42] The faxes there involved prescription medications, not surveys. Regardless of M3's speculations as to why the defendant in that case settled, it was approved as fair by a federal District Court. M3 also asserts that plaintiff lawyers are pushing the boundaries of the TCPA's definition of "advertisement," pointing to a case, *Matthew N. Fulton, D.D.S., P.C. v. Enclarity, Inc.,* that was dismissed at the motion to dismiss stage.[43] The fax in *Enclarity* involved a request by a data company to confirm certain identifying information. There was nothing about a survey. Moreover, *Enclarity* explicitly distinguished the decisions of the District Court in the M3 case:

> This case is unlike *Comprehensive Health Care Systems of the Palm Beaches*, a case Plaintiff cited as persuasive authority at the hearing. In that case, there are two significant "facts" cited by the court that distinguish that case from this one: (a) "The faxes at issue direct a potential participant to [defendant's] survey weblink," and (b) "Defendant offers compensation for participation in online surveys and advertises the commercial availability of Defendant's online paid survey program, through which Defendant gathers market research and opinions from health professionals for its clients." *Comprehensive Health Care Systems of the Palm Beaches,* 2017 WL 108029, at *3 (emphasis added). Based on those "facts," which differ from this case, that court concluded that there was a question whether the defendant's survey fax was mere "pretext for advertising its [*i.e.*, the defendant's] goods or services."[44]

It is hard to see how a case dismissing a TCPA complaint at the pleading stage

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[42] No. 16-cv-02653 (N. D. Ill.).

[43] Petition at 16, *citing Matthew N. Fulton, D.D.S., P.C. v. Enclarity, Inc.,* No. 16-cv-13777, w0q7 WL 183499 (E.D. Mich. March 1, 2017).

[44] 2017 WL 783499 at * *4.

justifies M3's claimed fears of a flood of oppressive litigation. On the contrary, the survey of cases M3 provides shows that the courts are doing just fine at distinguishing those cases in which faxes are not advertisements, and those cases where there is a factual issue warranting discovery.

IV. WHETHER M3'S FAXES ARE PRETEXTUAL IS A FACTUAL QUESTION PROPERLY RESOLVED IN COURT.

As the District Court found, there is sufficient evidence from M3's website that it designed its faxes to induce recipients to register at the M3 website by offering them money in exchange for registering at the website, after which they would have had to agree to receive future advertisements from M3. The faxes were also intended to allow M3 to use information provided by registrants for marketing itself to third parties.

M3 contends that survey invitations should be excluded *carte blanche* from the TCPA's "advertisement" definition.[45] That is contrary to the existing law on fax surveys, which the Commission clarified in 2006, stating:

> [T]he Commission concludes that any surveys that serve as a pretext to an advertisement are subject to the TCPA's facsimile advertising rules. The TCPA's definition of "unsolicited advertisements" applies to any communication that advertises the commercial availability or quality or property, goods or services, even if the message purports to be conducting a survey.[46]

As the FCC Regulation states, a fax that appears to be just a survey is an advertisement if it is a pretext for a commercial purpose. Here, that is precisely the

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[45] Petition at 17.

[46] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; the Junk Fax Prevention Act of 2005*, 71 FR 25967-01, 25972 (May 3, 2006) (the "FCC Regulation").

issue. The District Court found that Plaintiffs have adequately alleged that M3's fax ad was a pretext because M3's Terms of Service and Privacy Policy expressly condition participation in the survey upon agreement to receive future ads.

The Commission has recognized two categories of faxes that were not "commercial" and, therefore, not "advertisements."[47] First, "transactional communications" that "facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender."[48] Second, "bona fide 'informational communications'" that "contain only information, such as industry news articles, legislative updates, or employee benefit information."[49] M3's faxes are not even close to fitting either exception. They do not reference any prior "transaction that [Plaintiffs] agreed to enter into with [M3]," so they are not transactional. And they do not contain any information akin to "industry news articles, legislative updates, or employee benefit information." In fact, they contain no information at all except a solicitation for Plaintiffs to visit M3's website for a chance at a sum of money.

M3 points to legislative history showing that the definition of "***telephone*** solicitation" in the TCPA was not intended to prevent polling and survey companies from calling people to do telephone research.[50] The Congressional history reflects concern that "the results of telephone surveys could be rendered unreliable if the

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[47] 71 CFR 25967-01 at 25972-73.

[48] *Id.* at 25972.

[49] *Id.* at 25973.

[50] *Id., citing* H.R. Rep. No. 102-317, at *13 (1991).

pool of subscribers available to be called was to be artificially limited by 'Don't Call' lists or other means."[51] However, Congress did not impose any such limitation in the definition of "advertisement" for obvious reasons. While survey participants are routinely cold-called by survey companies and surveyed on the telephone, surveys are not generally conducted by sending a series of questions by fax to random individuals, because there is no way to control the population who would respond to the faxes. Indeed, it might make sense to *presume* that a fax list of questions that the recipient is supposed to return to the sender is probably pretextual in some sense.

In any case, what M3 does is far more than conduct a survey by fax. Instead, it sends an invitation inducing the recipient provider to take a survey for a paid honorarium. To participate, the recipient of the fax has to sign up at an online web portal. By doing so the recipient becomes part of M3's medical social network, and automatically is deemed to have agreed to receive advertising and other M3 services.

M3 contends that any commercial profit it receives by luring providers into its social network is an "ancillary, remote and hypothetical economic benefit," but that is precisely the factual issue to be decided in the lawsuit. Was the use and registration at the website an underlying purpose of M3's faxing campaigns, for which the survey invitation was partly pretextual, or were the website registrations merely a remote, ancillary benefit. Lest there be any doubt on that score, the evidence to date shows that the step of registration at the website, thereby

[51] *Id.*

triggering M3's commercial advertising and newsletters, was a necessary component of taking the survey. The factual question—legitimate survey business or pretext for website registration—is best resolved through court processes rather than determination by the Commission.

Contrary to its arguments here, M3's fax was indisputably "commercial" because its aim was to profit M3. Plaintiffs have alleged M3's ad was a smokescreen to entice Plaintiffs into consenting to receive future ads from M3 and to increase M3's commercial website traffic. M3's survey was intended for "marketing research," which is a "commercial" activity, not a scientific activity. Moreover, M3's faxes did not provide any useful information to Plaintiffs. Instead, the faxes solicited Plaintiffs to visit M3's website and spend 25 minutes "earning" money in exchange for disclosing opinions for a "marketing research survey." Whether M3's primary aim was to buy Plaintiffs' time and opinions, or sell M3's websites, or both, the aim was still commercial. M3's fax ads were "commercial" and, therefore, were "advertisements" under the TCPA. At a minimum, this poses a factual dispute properly resolved through litigation.

CONCLUSION

The Commission should deny M3's petition in its entirety.

Respectfully submitted,

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